

Economic Consultant:
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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	WC Docket No. 07-52
Broadband Industry Practices.)	
)	

REPLY COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

I. INTRODUCTION AND SUMMARY

A. Introduction

The New Jersey Division of Rate Counsel (“Rate Counsel”) hereby replies to the initial submissions filed in the above-captioned proceeding regarding industry practices in the market for broadband and related services.¹

B. Summary

Various industry members advocate a regulatory “hands-off” approach to net neutrality,² often based on an erroneous assumption of effective competition for the broadband platform. Rate Counsel reiterates its recommendations made in initial comments that the Federal Communications Commission (“FCC” or “Commission”) should: (1) adopt a fifth broadband principle, to protect net neutrality; (2) establish net neutrality requirements through a rulemaking proceeding to strengthen the Commission’s

¹/ *In the Matter of Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry, FCC 07-31 (rel. April 16, 2007).

²/ *See generally*, AT&T, Inc.; Verizon and Verizon Wireless; Qwest Corporation International, Inc.; Hands Off the Internet; American Consumer Institute; CTIA- The Wireless Association®; Embarq Corporation; Internet Freedom Coalition; Time Warner, Inc.; and U.S. Chamber of Commerce.

ability to enforce the principle, including the adoption of fines and threat of license withdrawals; (3) require Internet access providers to provide consumers with clear information about any limits that the providers may have on downloading, as well as about pricing practices and time limits on introductory rates; and (4) monitor the practices of broadband providers, analyze consumer complaints carefully, and collaborate with state regulators to assess the status of the market.³ Adequate measures for consumer protection are entirely compatible with -- and indeed are essential for -- market innovation.

II. RATIONALE FOR OVERSIGHT OF BROADBAND INDUSTRY PRACTICES

A net neutrality requirement is essential to prevent the suppliers of the broadband “on-ramp” to the Internet from exerting undue influence over consumers’ and information providers’ use of the Internet.

Rate Counsel urges the Commission to heed the warnings of those that recommend that the Commission establish unambiguous requirements for net neutrality. Among others, BT Americas, Inc. (“BTA”) states that regulation should address the “unregulated market power over broadband access exercised by vertically integrated providers of Internet access, transport, applications and content.”⁴

The Computer and Communications Industry Association (“CCIA”) observes that:

We are more convinced than ever that to achieve the great technological, social and economic benefits which our industry can continue to provide, these foundational principles of openness and competition are essential.

³/ Rate Counsel, at 4-8.

⁴/ BTA, at 1-2.

Neutral end user access is the most important public policy that must be defended against broadband industry practices that might compromise it.⁵

CCIA also recommends that the Commission make the four Internet principles enforceable.⁶

Consumers require adequate education about industry practices.

Rate Counsel concurs with recommendations for improved customer education about industry practices. CCIA recommends that the Commission require broadband access providers to comply with specific disclosure requirements; and require broadband access providers to inform end users of both download and upload speeds, latency, and other quality factors.⁷ Similarly, the Center for Democracy and Technology (“CDT”) emphasizes the need for consumers to be informed adequately about industry practices.

CDT states:

While there is an ongoing debate about whether market forces alone can protect against potentially harmful practices in the broadband market, it should be clear that market forces will not provide much protection if the practices in question are not transparent. Simply put, consumers cannot exert pressure against practices they do not know are occurring.⁸

CDT also explains aptly the relationship between the goal of nondiscrimination and consumers’ entitlement to unfettered access to the Internet, stating that to “*encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to access and use the content, applications,

⁵/ CCIA, at 1.

⁶/ *Id.*, at 4.

⁷/ *Id.*, at 4.

⁸/ CDT, at 13.

services, and devices of their choice without unreasonable discrimination by their network provider with respect to speed, service quality, or price.”⁹

Concerns about network degradation are more than theoretical.

Commenters provide examples of network degradation, which demonstrates the need to establish enforceable network neutrality requirements now, before broadband providers can stifle innovation any further. For example, BTA shows that Verizon Wireless blocks iTunes in favor of its own VCast product.¹⁰ Data Foundry, Inc. (“DFI”) provides multiple examples of BSPs violating the tenets of the Commission’s four Policy Principles by prohibiting certain content, disallowing applications such as voice over Internet protocol (“VoIP”), peer-to-peer (“P2P”) applications, and forbidding the use of off-the-shelf routers.¹¹ EarthLink, Inc. and New Edge Network, Inc. (“EL/NEN”) refer to actual customer service agreements to show the restrictions placed on consumers by access providers.¹² Delay in establishing and enforcing clear restrictions on network discrimination will discourage innovative applications and uses of the Internet, thereby denying consumers the benefits that an open Internet would yield.

⁹/ *Id.*, at 14 (emphasis in original).

¹⁰/ BTA, at 10.

¹¹/ DFI, at 6-8 and Attachment A.

¹²/ EL/NEN, at 7-8.

All consumers, regardless of whether they reside in AT&T's footprint, merit protection from harmful discrimination practices.

Others echo Rate Counsel's arguments regarding the importance of ensuring that all consumers, regardless of whether they happen to reside in AT&T's operating territory, benefit from net neutrality requirements.¹³ DivX, Inc. ("DivX") states:

If it makes good policy sense for Verizon and AT&T to be legally bound by the Policy Statement principles, then it makes even better sense to ensure that all broadband Internet access providers – whether cable modem, DSL, wireless or broadband over power line providers – are bound as well. Similarly, the AT&T/BellSouth "neutral routing" requirement should be extended to all broadband Internet access providers, regardless of technology, so that all broadband subscribers are protected from harmful discrimination practices.¹⁴

Similarly, CCIA recommends that the Commission extend the net neutrality conditions that apply to AT&T (as a result of the Commission's order approving AT&T's acquisition of BellSouth) to all fifty states.¹⁵

The broadband market is not competitive.

Rate Counsel has demonstrated comprehensively that the broadband market is not competitive,¹⁶ which, in turn, undermines the industry's claim that net neutrality is unnecessary. Other commenters, such as Google, agree, calling the market "highly

¹³/ Rate Counsel, 7.

¹⁴/ DivX, at 9.

¹⁵/ Id., at 6.

¹⁶ See Susan M. Baldwin, Sarah M. Bosley and Timothy E. Howington, "The Cable-Telco Duopoly's Deployment of New Jersey's Information Infrastructure: Establishing Accountability," White Paper prepared for the Public Advocate of New Jersey Division of Rate Counsel, January 19, 2007 ("Cable-Telco Duopoly White Paper"). The Cable-Telco Duopoly White Paper was submitted as Attachment A to the Comments of the New Jersey Division of Rate Counsel in the proceeding *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, filed May 16, 2007.

concentrated.”¹⁷ Similar to concerns that Rate Counsel has raised in other proceedings,¹⁸ DivX shows that market forces alone are inadequate to protect the consumer because industry protections -- e.g., fees and switching costs -- are built into contracts:

In reality, however, there are significant costs associated with switching broadband providers, which means that some amount of content discrimination may not cause mass defections to rival providers. Such switching costs include long term contracts with high termination fees, the costs of finding an alternative provider, as well as new equipment and installation costs. In some instances, the consumer may have to switch multiple services because of the bundling practices of the broadband provider.¹⁹

The Consumer Federation of America, Consumers Union, and Free Press (“CFA, et al.”) state that “[w]ith inadequate competition and little public obligation, the cozy duopoly dribbles out capacity at high prices and restricts the uses of the network, chilling innovation in applications and services and causing a much lower rate of penetration of broadband in the U.S. than abroad.”²⁰

¹⁷/ Google, at 10; see also BTA, at 1-2.

¹⁸/ See generally Cable-Telco Duopoly White Paper; *In the Matter of AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74, Declaration of Susan M. Baldwin, Sarah M. Bosley, and Timothy E. Howington on behalf of the New Jersey Division of Rate Counsel, October 3, 2006; *In the Matter of Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Declaration of Susan M. Baldwin and Sarah M. Bosley on behalf of the New Jersey Division of Ratepayer Advocate, May 9, 2005.

¹⁹/ DivX, at 12.

²⁰/ CFA, et al., at 2. See also CFA, et al., at 123 stating that “it was network neutrality that gave us the vibrant competition and innovation on the Internet that we have enjoyed for a quarter of a century.”

III. POLICY RECOMMENDATIONS

As stated in Rate Counsel’s initial comments and as reiterated by numerous commenters,²¹ the Commission should add an enforcement mechanism to the Internet Policy Statement already in place. According to DFI, the policies, as currently written, are “toothless and inspirational at best.”²² Google states that “actual rules with actual remedies will have a far greater deterrent effect on the broadband providers than unenforceable proclamations.”²³

The Commission should adopt the principle that CFA, et al. propose: “To encourage broadband deployment and preserve and promote the open and interconnected nature of the Internet, the ability of Internet users to produce, distribute, and access the lawful Internet content of their choice and use applications and services of their choice shall not be impeded.”²⁴ Rate Counsel also concurs with CFA, et al. that the FCC should declare that these principles are enforceable under Title II of the Act. As CFA, et al., explain: “The Supreme Court deferred to the FCC’s expertise and authority in allowing it to abandon the obligation of nondiscrimination. If the agency has the discretion and authority to [sic] such a historic mistake, it certainly has the same discretion and authority to correct its error, when presented with such clear evidence of its failure.”²⁵

²¹/ Rate Counsel, at 7-8; see also, for example, NASUCA, at 23; CFA, et al., at 27-29.

²²/ DFI, at 14.

²³/ Google, at 22.

²⁴ / CFA, et al., at 4.

²⁵/ *Id.*, at 4; 27-29.

IV. CONCLUSION

Rate Counsel urges the Commission to take timely steps to adopt and to enforce a nationwide policy of net neutrality so that consumers can benefit from the diverse and innovative applications of the Internet that such an open network will foster. Rate Counsel also recommends that the Commission adopt additional consumer protection measures including those that ensure that the industry informs consumers adequately about industry rates, terms, and conditions.

Respectfully submitted,

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